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BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, DC 20554

In re Applications of	)	
	)	
Martin W. Hoffman, Trustee-in-Bankruptcy for Astroline Communications Company Limited Partnership	)	MM Docket No. 97-128
For Renewal of License of Station WHCT-TV, Hartford, Connecticut	)	File No. BRCT-881201LG
and	)	
Shurberg Broadcasting of Hartford	)	
For Construction Permit for a New Television Station to Operate on Channel 18, Hartford, Connecticut	)	File No. BPCT-831202KF

TO: The Honorable John M. Frysiak
Administrative Law Judge

MOTION FOR LEAVE TO REPLY

On June 9, 1997, Shurberg Broadcasting of Hartford ("SBH") and the Mass Media Bureau ("Bureau") opposed the "Petition For Leave To Intervene" ("Petition") filed by Two If By Sea Broadcasting Corporation ("TIBS") on May 29, 1997. TIBS respectfully moves for leave to submit the following reply to those oppositions.

Accepting TIBS' reply is just, prudent, and will serve the public interest. At issue is the most fundamental legal precept -- the right to be heard in proceedings that affect one's interests. That right should not be threatened by precluding consideration of meaningful response to erroneous opposition arguments like those presented here.

In addition to the basic due process rights at stake, the public interests in orderly and efficient proceedings, complete and accurate fact finding, and correct and sound adjudications all support consideration of TIBS' reply. Under §301(a)(1) of the Rules, an order denying TIBS the right to participate is appealable to the Commission as a matter of right, and such appeal may not be deferred and raised as an exception to the initial decision. Therefore, if such an order were entered based on the misguided oppositions filed here without considering TIBS' reply, the appeal of that order would disrupt and delay the disposition of the substantive issues in the case. Indeed, in order to avoid a tainted record compiled without TIBS' participation, it would be appropriate for the proceedings to be stayed entirely until TIBS' right to participate is finally determined. And, without such a stay, the the need to repeat the proceedings that were already conducted without TIBS' participation, following an appellate decision that TIBS had the right to participate in those proceedings after all, would cause severe disruption, inefficiency, and delay. The better course — the course that serves the public interest — is to consider TIBS' reply.

Moreover, the public interest is advanced by compiling a complete evidentiary record and weighing the viewpoints of all interested parties. Consideration of TIBS' reply and a ruling permitting it to participate will fulfill that public interest. The goal of reaching a correct and sound decision on the merits is not served by barring the contributions of a truly interested party. No decision to do so should be made without considering all responsive arguments.

TIBS' Participation Is Fully Justified

In its opposition, the Bureau cites the Commission's rulings in NAB Petition for Rulemaking, 82 FCC 2d 89 (1980), that "anyone with a right to appeal a Commission decision should be able to present his claims to the agency before the decision is made," and that the Commission "must apply

judicial standing principles in determining whether an entity qualifies as a party in interest." Bureau Comments at 3-4. However, the Bureau then fails totally to address the judicial standing principles, which establish that TIBS *does* qualify as a party in interest. The Bureau also acknowledges that a party who "may be 'aggrieved' or 'adversely affected' by an adverse decision" has standing to participate (id. at 4), but then ignores the substantial, adverse economic impact that TIBS will suffer from being deprived ownership of a valuable television station through action in this proceeding.

Contrary to the Bureau's analysis (Comments at n. 2), TIBS' interest does not stem from a claim that it is a creditor of the licensee. Rather, TIBS' interest rises from the facts that it holds a contract to acquire the station at issue and that denial of the Trustee's application in this case is mutually exclusive with TIBS' rights as the prospective assignee. Under long settled "judicial standing principles," each of those facts establishes TIBS' status as a party in interest.

In Granik v. FCC, 234 F.2d 682 (D.C. Cir. 1956), the Court of Appeals quashed the notion that a party holding a contractual right to acquire a station as TIBS holds here may be excluded from Commission proceedings which affect the disposition of that station. In Granik, appellants Granik and Cook claimed the right under an option agreement to acquire a station and filed a civil action to enforce that right. When the licensee, Esch, sought authority to dispose of the station to a different party, the Commission, despite knowing of the aggrieved parties' situation, denied them standing as parties in interest and acted without their participation. The Court of Appeals reversed that action and declared --

> "We think Granik and Cook had standing to protest under section 309(c) and to petition for reconsideration under section 405. By contract they had secured an interest in Esch's ownership of the license. The proceedings on Esch's application to the Commission were calculated to lead to Commission action inconsistent with [Granik and Cook's] interests, which were known to the Commission. Indeed, the

> action of the Commission granting the assignment application amounted to approval of transfer of the station license to intervenor notwithstanding Esch was shown, prima facie, to have contracted to apply to the Commission for assignment of the license to [Granik and Cook]. Under any ordinary construction of sections 309(c) and 405 appellants were parties in interest, persons aggrieved, or persons whose interests were adversely affected by this action of the Commission." 234 F. 2d at 684.

Linking these circumstances to the seminal pronouncement of judicial standing principles in FCC v. Sanders Brothers Radio Station, 309 U.S. 470 (1940), the Court continued--

> "The stake of appellants in the facilities of the station and in the license seems to us to reach a status comparable to the economic interest which gave standing in Sanders. In fact their stake includes an economic interest, though not that of a competitor as in Sanders." 234 F. 2d at 685.

The Court thus concluded that appellants "have a tangible, substantial and particular interest in the subject matter of the Commission proceedings." Id.

Here TIBS not only has a contract to buy the station at issue (Petition at Exhibit 1), it also has two orders of the federal courts authorizing that transaction (id. at Exhibits 2 and 4) and an application at the Commission to approve it (id. at Exhibit 3). Moreover, denial of the Trustee's renewal application in this proceeding will defeat that transaction. Thus, as in Granik, "By contract [TIBS] ha[s] secured an interest in [the Trustee's] ownership of the license" and "[t]he proceedings on [the Trustee's] application to the Commission [are] calculated to lead to Commission action inconsistent with [TIBS'] interests, which [are] known to the Commission." As in Granik, "The stake of [TIBS] in the facilities of the station and in the license ... reach[es] a status comparable to the economic interest which gave standing in Sanders" and "[TIBS has] a tangible, substantial and particular interest in the subject matter of the Commission proceedings." In short, "[u]nder any

ordinary construction," TIBS is a "part[y] in interest," a "person aggrieved," and a person whose "interests [are] adversely affected" by this proceeding.[1]

TIBS also has the right to intervene because TIBS' pending assignment application is mutually exclusive with denial of the Trustee's renewal application. Where an application is mutually exclusive with the application of a different party, both parties clearly have the right to participate in a hearing. Ashbacker Radio Corp. v. FCC, 326 U.S. 327, 333 (1945). Here, denial of the Trustee's renewal application would result in the grant of SBH's application, which is mutually exclusive with TIBS' assignment application. The Ashbacker Court stated that "if the grant of one [application] effectively precludes the other, the statutory right to a hearing which Congress has accorded applicants before denials of their applications becomes an empty thing." Id. at 330. If SBH were to obtain the station through the Commission's denial of the renewal application, TIBS' assignment application effectively would become moot without TIBS' having had the opportunity to advocate for the renewal and assignment.

In this regard, SBH's reliance on Telephone and Data Systems, Inc., 9 FCC Rcd 2780 (Rev. Bd. 1994) ("TDS"), is grossly misleading. That case and the one on which it relies, AT&T Co., 7 RR 2d 515 (1966), provide only that intervention is not warranted for "different principals" of an applicant who share identical or common interests. 9 FCC Rcd at 2781(¶7). Unlike those cases, TIBS is not a stockholder or otherwise a principal of the bankruptcy estate whose application is

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[1] The Court in Granik recognized the distinction between an interest that accords standing to participate and a substantive position on the merits of an application. While the Commission properly defers to the courts regarding the enforcement of contractual rights on the merits, the point of Granik is that such contractual rights do constitute a valid interest that gives the holder standing to participate in Commission proceedings on related matters which are within the Commission's authority.

involved here. Moreover, SBH conveniently fails to mention the very next sentence in TDS, where the Board found it significant that TTI, the petitioner to intervene, "has not shown that it has any mutually exclusive applications" that would be affected by the proceedings and justify intervention. Id. Here, TIBS *has* shown that it has such an application and that intervention is justified. (Petition at Exhibit 3).

Also misleading is SBH's claim that TIBS cannot contribute to the fact-finding because it was not involved with the station when Astroline Communications Company Limited Partnership ("Astroline") was the licensee. (SBH Opp. at 5-6) For example, SBH now concedes in its opposition that previous litigation has occurred that is "relevant to factual areas at issue in the instant hearing." Id. at 6. What SBH fails to disclose is that it was *TIBS* who brought the relevance of that litigation to the forefront.

Specifically, in its Petition For Reconsideration filed with the Commission on March 3, 1997, at pages 8-11, TIBS demonstrated that the question of whether Astroline was minority controlled has already been litigated in depth in the bankruptcy court where -- after an evidentiary hearing that involved over 300 exhibits and nine full days of live testimony -- the Court held that it

> "would have to engage in conjecture and surmise to find *any* control of the Debtor's day-to-day operation of the Channel 18 television station [by Astroline's limited partner]. The Court credits the testimony of Ramirez [Astroline's general partner], supported by that of Planell and Rozanski [employees Ramirez hired], that he, as the managing general partner, exercised *fully* his powers as such, and that [the limited partner] had no equal voice in his decisions." In re Astroline Communications Company Limited Partnership, 188 B.R. 98, 105-106 (Bankr. D. Conn. 1995) (emphasis added).

The Court further held that Ramirez, the controlling minority, hired an Hispanic station manager (Planell) and the business manager (Rozanski), and that "Ramirez and Planell, together or separately

handled the matters of the hiring and firing of station personnel, station programming, equipment purchases, and dealing with the Debtor's vendors;" that Ramirez and Roganski directed the preparation of checks; that every invoice Ramirez wanted paid was paid; and that the signing of checks by limited partners was reasonably explained or short-lived. Id. at 101, 106. The decision that the minority general partner, Ramirez, "fully" exercised his powers to control the partnership and that the court could not find "any" control exercised by the limited partner has been affirmed by the United States Court of Appeals for the Second Circuit. In Re Astroline Communications Co. Limited Partnership, Case No. 96-5112L, -5118 (XAP), Order filed April 17, 1997.

For its part, SBH never told the Commission of the outcome of what it now admits is "relevant" litigation. To the contrary, even after the judicial ruling that Astroline was minority-controlled was made, SBH asserted to the Commission that "it cannot be said that the issue of fraud and misrepresentation has *ever* been resolved by the Commission *or any Court.*"[2] Since the Court *had* explored the question of control of Astroline that underlies the alleged fraud and made the "relevant" finding that Ramirez, a minority, *did* control Astroline, SBH can hardly be trusted to ensure that a complete record is compiled. For the Trustee's part, he was in a position adversarial to Astroline in the litigation and thus would likely to be disinclined to bring the decision forward.

In short, it was only through the participation of TIBS that the relevant information emerged that a record of hundreds of exhibits and volumes of testimony concerning the propriety and good faith of Astroline's claim of minority control already exists. Those exhibits and that testimony will be highly germane in this proceeding. That contribution is precisely what an interested party like

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[2] "Formal Opposition to, and Motion to Strike, Letter Request Seeking Emergency Relief," filed by SBH on December 27, 1996, at p. 31.

TIBS can be expected to make. There is no reason to believe that, just as TIBS contributed greatly in making the availability of this evidence known, its presentation of additional evidence, examination of witnesses, and submission of findings of fact and conclusions of law will not similarly contribute to the compilation of a complete and accurate record and the entering of a sound and just decision. The public interest seeks those goals and warrants TIBS' participation to achieve them.[3]

Also without merit is SBH's contention that "the HDO addressed [the intervenor's] involvement ... and denied it party status." (SBH Opp. at 2). The HDO does not say a word about whether TIBS should be granted or denied party status. All it does is leave that question for a petition to intervene to the Presiding Judge, which is an accepted approach. Spanish International Broadcasting Co. v. FCC, 385 F. 2d 615, 625-26 (D.C. Cir. 1967) (where the HDO did not determine whether appellant was a party in interest, appellant had the right to petition to intervene as such). Considering TIBS' direct and compelling interest in the outcome of this proceeding, the Commission and surely the courts would be shocked if TIBS were excluded from participating.

[3] It should be noted that, since TIBS qualifies to intervene as of right under §1.223(a) of the Rules, a demonstration that it can contribute to the proceeding is not required. 47 C.F.R. §1.223(a); Elm City Broadcasting Corp. v. United States, 235 F.2d 811, 816 (D.C. Cir. 1956) (under 47 U.S.C. §309(b), which like current §309(e) provided for intervention as of right by a party in interest, the Commission "may not deny intervention to a party in interest merely because it thinks his participation would not aid its decisional process"); Algreg Cellular Engineering, 6 FCC Rcd 5299, 5300 (¶8) (Rev. Bd. 1991). Nonetheless, it is apparent from the foregoing that TIBS' participation will materially aid the decisional process in this case.

Conclusion

For the foregoing reasons, the public interest will be served by accepting this reply and granting TIBS' Petition For Leave To Intervene.

Respectfully submitted,

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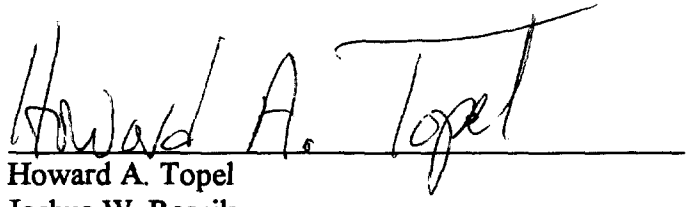
By: 

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June 18, 1997

CERTIFICATE OF SERVICE

I, Joan M. Trepal, a secretary in the law firm of Fleischman and Walsh, L.L.P., hereby certify that on this 18th day of June, 1997, copies of the foregoing "Motion for Leave to Reply" were sent by first class mail, postage prepaid, to the following:

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